

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 7, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2760

Cir. Ct. No. 2014FO308

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CITY OF EAGLE RIVER,

PLAINTIFF-RESPONDENT,

V.

MARK E. SLUSARCZYK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vilas County:
MICHAEL H. BLOOM, Judge. *Reversed.*

¶1 STARK, J.¹ Mark Slusarczyk appeals a judgment finding he violated a City of Eagle River sign ordinance. Slusarczyk argues the ordinance

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

does not apply because his sign does not meet the definition of an off-premises sign. He also argues the City's ordinance conflicts with a preemptive state statute, and that the ordinance, as applied, violates his constitutional rights. We conclude the Eagle River ordinance conflicts with a preemptive state statute and reverse.

BACKGROUND

¶2 Slusarczyk owns and operates the Traveler's Inn in Eagle River, Wisconsin. The inn adjoins property that houses the Synergy Salon and Spa. Conflict arose between Slusarczyk and the salon owner as a result of salon customers regularly parking in the inn's private parking lot. Accordingly, Slusarczyk posted a sign on his parking lot property that read:

PRIVATE PROPERTY NO TRESPASSING !
TRAVELERS INN GUESTS
PARKING ONLY
DO NOT BLOCK DRIVEWAY ANY TIME
NO! SYNERGY OR THEIR RUDE GUESTS
PROHIBITED THANK YOU

¶3 Slusarczyk was cited for violating CITY OF EAGLE RIVER, WIS., ZONING ORDINANCE § 106-683 (Mar. 11, 2008), which provides: "Off-premises signs are allowed by a conditional grant. One double-sided sign is allowed per business with a maximum size of 180 square feet per side." The citation stated that Slusarczyk had an "off premise sign on property promoting other business activity." CITY OF EAGLE RIVER, WIS., ZONING ORDINANCE § 106-631 defines an off-premises sign as "a sign which directs attention to a business, product, service, or entertainment not conducted, sold or offered upon the property where such sign is located."

¶4 A trial was conducted November 5, 2014. After hearing from the parties and their witnesses, the court observed the parties had spent time

discussing and questioning “whether the reference to Synergy on the sign located on the Traveler[']s Inn property is, quote, advertising, unquote for Synergy.” The court stated:

In my judgment, the reference to Synergy is not advertising for Synergy. However, the language of the ordinance does not reference advertising; it states a sign which directs attention to a business not conducted upon the property where the sign is located.

Certainly reference to Synergy on the sign in this case directs attention to the Synergy business, which is not located on the property where the sign is located. Therefore, it is an off-premises sign as defined by the ordinance which I’m required to apply in this case, and the sign is not the subject of a conditional use permit or the conditional grant that is required by the ordinance.

There is obviously a large amount of activity that is going on in the background of this situation. Mr. Slusarczyk’s frustration is palpable, and it may be justified, but that is not what is before me.

¶5 The court found Slusarczyk guilty. Slusarczyk was fined, and he appeals.

DISCUSSION

¶6 Slusarczyk makes three arguments on appeal. First, he argues the off-premises ordinance does not apply to him because his sign did not meet the definition of an off-premises sign. Second, Slusarczyk asserts the ordinance improperly forbids signs that the state legislature has expressly authorized. Finally, Slusarczyk argues the ordinance, as applied, violates his First Amendment rights.

¶7 Assuming without deciding the Eagle River ordinance does apply to Slusarczyk’s sign, we turn to Slusarczyk’s argument that the Eagle River

ordinance forbids signs expressly authorized by the state legislature. Slusarczyk correctly observes that where “the state has entered the field of regulation, municipalities may not make regulation inconsistent therewith.” ***DeRosso Landfill Co. v. City of Oak Creek***, 200 Wis. 2d 642, 651, 547 N.W.2d 770 (1996). The State of Wisconsin has preempted the field of traffic regulations, and our supreme court has stated that “no local authority may enact any traffic regulation unless such regulation is not contrary to or inconsistent with [WIS. STAT. Chapters 341 to 348 and sec. 349.03].” ***City of Janesville v. Walker***, 50 Wis. 2d 35, 36-37, 183 N.W.2d 158 (1971).

¶8 The Wisconsin Motor Vehicle Code includes provisions that regulate and authorize signs permitting or prohibiting parking. WISCONSIN STAT. § 346.55(4) provides, in part: “Owners or lessees of public or private property may permit parking by certain persons and limit, restrict or prohibit parking as to other persons if the owner or lessee posts a sign on the property indicating for whom parking is permitted, limited, restricted or prohibited.”

¶9 Slusarczyk contends his sign “clearly falls within the scope of the statue [sic]. It indicated for whom parking is prohibited. The sign ... directs attention to Synergy’s customers that they are not to park on motel property. This is a practice permitted by law.” He argues he “has a right to restrict parking under the state statute, and has a right to post a sign indicating for whom parking is prohibited. ... The City’s ordinance restricts his ability to control parking.”

¶10 This argument presents a question of the legal interpretation of an ordinance and a state statute, both of which we review de novo. ***State v. Ozaukee Cnty. Bd. of Adj.***, 152 Wis. 2d 552, 559, 449 N.W.2d 47 (Ct. App. 1989). Our independent review shows the City’s ordinance conflicts with the state statute.

¶11 Under the plain language of WIS. STAT. § 346.55(4), a property owner may “limit, restrict, or prohibit parking as to other persons” by posting “a sign on the property indicating for whom parking is permitted, limited, restricted, or prohibited.” The City argues that “there is nothing in the language of City of Eagle River Ordinance § 106-683 that prohibits a sign which informs certain businesses or customers of those businesses that they are not allowed to park on someone else’s private property.” We disagree, as the ordinance was applied to work that very effect here. The statute and ordinance are in conflict because Slusarczyk’s sign specifically prohibiting Synergy and its customers from parking on his property is allowed under the state statute, but forbidden by the Eagle River ordinance.

¶12 The City insists that there is no conflict because “WIS. STAT. § 346.55(4) permits the sort of sign Mark Slusarczyk put up in this matter[, and] City of Eagle River Ordinance § 106-683 also permits the sort of sign Mark Slusarczyk put up in this matter, as long as a conditional use permit is first granted for the sign.” However, this argument resembles that made by the Town of Rhine in *Town of Rhine v. Bizzell*, 2008 WI 76, ¶55, 311 Wis. 2d 1, 751 N.W.2d 780. The Town argued conditional uses were permitted uses “because once the standards have been satisfied a landowner is ‘entitled’ to the conditional use.” Our supreme court disagreed and held that “[e]ven though conditional uses may be authorized pursuant to the ordinance, that does not render them uses as of right.” *Id.*, ¶¶55-56. Because a preemptive state statute grants Slusarczyk the right to indicate for whom parking is restricted or prohibited on his property, the City of Eagle River cannot restrict that right by requiring Slusarczyk to first obtain a conditional grant.

¶13 We conclude, under the facts of this case, that ZONING ORDINANCE § 106-683 conflicts with WIS. STAT. § 346.55(4) and is unenforceable. Therefore, we need not address Slusarczyk’s argument that the ordinance violated his right to free speech. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (Cases should be decided on the narrowest possible grounds.).

By the Court.—Judgment reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

